Supreme Court, U.S.
FILED

931460 MAR 15 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

KAREN KOELKER,

Petitioner,

vs.

MICHAEL KOELKER,

Respondent.

Petition For Writ Of Certiorari
To The California Court Of Appeals, First District

PETITION FOR WRIT OF CERTIORARI

KAREN KOELKER
In Pro Se
Counsel of Record
670 Colusa Avenue
Berkeley CA 94707
Telephone: (408) 778-6408
Counsel for Petitioner

I.
QUESTIONS PRESENTED

1. Does equal protection of the law mandate that support for a child who was the product of a rape during the marriage should be born equally by both spouses, and counted as part of the mother's needs for the award of spousal support in a community property state?

2. Does refusal to integrate into a spousal support award tax consequences which negatively impact the supported spouse and positively favor the supporting spouse, in a community property state, violate equal protection of the law?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REVIEW OF STATE COURT PROCEEDINGS	7
REASONS FOR GRANTING THE WRIT	11
I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A WOMAN WHO REFUSES TO ABORT THE CHILD OF A RAPE IS DENIED EQUAL PROTECTION OF THE LAW WHEN THE LEGALLY MANDATED COSTS OF THAT CHILD ARE NOT CONSIDERED AS PART OF HER "NEEDS" IN ESTABLISHING SPOUSAL SUPPORT IN A COMMUNITY PROPERTY STATE	11

TABLE OF CONTENTS
(continued)

		Page
II.	THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT THE REFUSAL TO CONSIDER DIFFERENT TAX CONSEQUENCES BETWEEN SPOUSES IN THE AWARD OF SPOUSAL SUPPORT VIOLATES EQUAL PROTECTION OF THE LAW	14
	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

In re Marriage of Baker (1992)
3 CA4th 491 ..... 3, 17

In re Marriage of Fransen (1983)
142 CA3d 419, 190 CR 885 6

In re Marriage of Hatch (1985)
169 CA3d 1213 16

In re Marriage of Paul (1985)
173 CA3d 913 ..... 3, 8

In re Marriage of Siegal (1972)
26 CA3d 88 ..... 3, 8

In re Marriage of Smith (1990)
225 CA3d 469 ..... 3, 17

Marriage of Kuppinger (1975)
48 CA3d 628, 120 CR 654 16

Michael M. v. Superior Court of Sonoma Cty. (1981)
450 US 463, 101 SCt 1200 7,

Orr v. Orr (1979)
440 US 268, 99 SCt 1102 ..... 9, 15

Parham v. Hughes (1979)
441 US 347, 99 SCt 1742 ..... 7, 13

Rebensdorf v. Rebensdorf (1985)
169 CA3d 138, 215 CR 76 ..... 8, 13

Reed v. Reed,
404 US 71, 92 SCt 251 ..... 2, 12

Trimble v. Gordon (1977)
430 US 762, 97 SCt 1459 ..... 7, 12

Weber v. Aetna Casualty & Surety Co.
406 US 164, 92 SCt 1400 14

U.S. CONSTITUTION

Fourteenth Amendment ..... *Passim*

CALIFORNIA CONSTITUTION

Article 1, Section 7(a) 11

CALIFORNIA STATUTES

Civil Code § 196 ..... 8, 9, 12, 13

Civil Code § 206 ..... 8, 12

Civil Code § 3532 8

Civil Code § 4370 16

Civil Code § 4801 ..... *Passim*

Civil Code § 4801 (a) (9) 14

Civil Code § 7002 12

Civil Code § 7004 ..... 9, 12

Code of Civil Procedure § 634 9

Penal Code § 270 ..... 8, 13

No. _____

In The

Supreme Court of the United States

October Term, 1994

KAREN KOELKER,

Petitioner,

vs.

MICHAEL KOELKER,

Respondent.

Petition For Writ Of Certiorari
To The California Court Of Appeals, First District

PETITION FOR WRIT OF CERTIORARI

Petitioner Karen Koelker respectfully prays that a Writ of Ceriorari be issued to review the judgment and opinion of the California Court of Appeals, First District, Division Three, entered in the above-entitled proceeding.

OPINIONS BELOW

The summary denial by the California Supreme Court of a petition for a writ of review is reprinted in the Appendix to this petition at App. 1.

The unreported opinion of the California Court of Appeals, First Appellate District, Division Three (Chin, J.), is reprinted in the Appendix to this petition at App. 2-14.

The summary denial by the California Court of Appeals, First Appellate District, Division Three of a petition for rehearing is reprinted in the Appendix to this petition at App. 15.

JURISDICTION

This Court has jurisdiction to review the judgment of the California Court of Appeals, First Appellate District, Division 3 under 28 U.S.C. § 1257.

On September 24, 1993, the California Court of Appeals, First Appellate District, Division 3 filed a decision upholding the judgment of the trial court.

On October 21, 1993, the California Court of Appeals, First Appellate District, Division 3 summarily denied petitioner's timely petition for rehearing.

On December 15, 1993, the California Supreme Court summarily denied a timely filed petition for review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fourteenth amendment to the United States Constitution provides, in applicable part, as follows:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The California Constitution, Art. I § 7 (a) reads as follows:

> "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

3. The following California statutes are involved in the case, and are set forth in the Appendix at App. 16-19.

Civil Code § 196
Civil Code § 206
Civil Code § 4801
Civil Code § 7002
Civil Code § 7004 (a)

Civil Code § 7004 (b)
Code of Civil Procedure § 634
Penal Code § 270

STATEMENT OF THE CASE

This is an appeal from a judgement of dissolution. It is also an appeal from the manner in which a legal system's insensitivity to the subtle remnants of centuries of paternalism has denied one woman and one child the equal protection of laws enacted by a state to ostensibly create a level playing field for women and children through the benign concept of "community property."

After 3 years of co-habitation, the parties were married in 1963 and throughout 22 years of marriage they enjoyed a relatively high standard of living. At the time of the trial, Michael was employed as corporate director of creative development for an advertising firm whose total worldwide billings in 1990 were $4.6 billion, and Karen managed the couple's real estate investments.

In 1985 Karen learned that she was pregnant from being raped; Michael quickly abandoned her and moved to Marin County. After being notified by Michael's attorney that he was filing for divorce, and after learning that Michael's secretary/lover had moved in with him, Karen filed the petition for dissolution of their marriage on November 13, 1986. On March 30, 1987, after a contested hearing, Karen was awarded temporary spousal support of $4,000 per month. Karen's motion for attorneys fees

pendite lite was denied, thus denying her the ability to secure an attorney of her choice.

On the same day, the parties stipulated that Karen's minor child, Riley R. -- a Downs Syndrome child born October 4, 1985, of a rape where the biological father was not convicted -- was not a child of the marriage.

Dissolution as to status was granted on October 6, 1987. On January 18, 1991, the court bifurcated trial of the date of separation, made various discovery orders, denied emergency support, and once again denied Karen's request for attorneys fees, to the detriment of her being able to select counsel of her choice.

During this period of time Karen had no earned income, and her community property brought in about $100 a month. Michael seized over $80,000 in a joint bank account and cancelled Karen's credit card.

On January 24 and 25, 1991, trial was held on the issue of the date of separation, which the court found was October 5, 1985. The court again denied Karen's request for funds for competent counsel.

On November 5, 1991, the parties stipulated to a division of community property. On that date, trial on the issue of spousal support began and continued through November 7, 1991.

The trial court found that the marital standard of living at the time of separation was "well over" $12,000 monthly.

In fact, the court was misled and Michael's income for 1990 according to his tax return was $550,000, which included a $200,000 bonus paid in 1991.

Karen was awarded spousal support of only $7,000 monthly, which was far short of her actual expenses and specifically **excluded** any expenses for her son, Riley R.

From January 1 through October 31, 1991, Michael's salary without bonus was $333,000, and according to a letter from his employer, which Michael contested, his bonus for 1991 would be some $300,000. Additionally, Michael's co-worker, sexual partner during the marriage (one of two he admitted), and co-inhabitant after he moved out of the family home, was earning a base salary of $190,000 per year exclusive of bonuses. Her bonus in 1990 was $60,000. Michael stipulated that he had the ability to pay any reasonable spousal support.

Karen timely requested a statement of decision and the court issued its statement of decision on January 3, 1992, but abused its discretion in so doing.

As the Court of Appeals observed in *In re Marriage of Fransen* (1983) 142 CA3d 419, 425, 190 CR 885, "The court must not simply recognize the criteria set forth in section 4801, subdivision (a), it must apply them." The trial court did **not** do so.

Trial on the issue of attorneys fees for Karen was held on December 9 and 11, 1991. A final spousal support and attorney fees order was filed on February 14, 1992.

On April 10, 1992, Karen filed a timely Notice of Appeal. The non-published decision of the Court of Appeals was handed down September 24, 1993, and rehearing was summarily denied October 24, 1993.

A petition for a writ of review was timely filed with the California Supreme Court, and was summarily denied on December 15, 1993.

REVIEW OF STATE COURT PROCEEDINGS

Appellant raised both of the questions presented to this Court as issues before the Court of Appeals:

Question No. 1

The trial court failed to consider Karen's legally mandated expenses to care for and maintain her dependent child, Riley R. App. 2 and 11-13.

The decision of the court of appeals below, in sustaining the trial court's refusal to allow the costs associated with raising a child who is a product of a rape of the mother, has violated the principles established by this Court in *Trimble v. Gordon* (1977) 430 U.S. 762, 97 S.Ct. 1459, *Parham v. Hughes* (1979) 441 U.S. 347, 99 S.Ct. 1742 and *Michael M. v. Superior Court of Sonoma Cty.* (1981) 450 U.S. 463, 101 S.Ct. 1200.

The Court of Appeal said Eldridge Cleaver "has a legal responsibility to provide for the care of his son." App. 12. But paternity has never been established and the only evidence on the record before it indicated Cleaver was an

indigent who could pay nothing toward Riley's support. "The law neither does nor requires idle acts." Civil Code § 3532. Yet the court distinguished *In re Marriage of Siegal* (1972) 26 CA3d 88 and *In re Marriage of Paul* (1985) 173 CA3d 913 because "[i]n each case, neither party nor any third party could be held legally responsible for the expenses at issue," App. 12, and held that the "trial court refus[ing] to extend the reasoning behind Siegel and Paul to this specific situation ... was not an abuse of discretion." App. 12-13.

The Court of Appeal was not justified in distinguishing these cases on the basis of Eldridge Cleaver's alleged and unproven paternity. Without a finding of paternity, there is no "responsible" third party.

The uncontroverted -- in fact, the **only** -- evidence before the trial court and the appellate court was that Riley was **not** a child of Karen's willing choice. Riley was the result of a rape; Karen refused to have an abortion.

Riley was thus no more Karen's than Michael's -- except for the physical accident of conception, which was not a voluntary act on her part.

Other than the immaterial fact that Karen is a female, why must Michael not also bear the responsibility for this "act of God" -- "in sickness and in health," etc.

California law requires Karen to care and provide for her Downs Syndrome child for the rest of his life. Penal Code § 270, Civil Code §§ 196, 206. *Rebensdorpf v. Rebensdopf* (1985) 169 CA3d 138, 215 CR 76.

California law also holds both parents equally responsible for a child. Civil Code § 196. And it presumes the husband is the child's father. Civil Code § 7004 (a) (1). This is a rebuttable presumption but in the instant case none of the means of rebuttal provided by law have been invoked and no father is named on the birth certificate.

It deprives the mother of equal protection to make her solely responsible for an act of rape which takes place during the marriage.

Question No. 2

The trial court abused its discretion when it failed to consider the tax consequences of the spousal support award to Karen. App. 2 and 6-11.

The decision of the court of appeals below, in sustaining the trial court's refusal to allow taxes paid to be credited equally between the husband and wife, has violated the principles established by this Court in *Orr v. Orr* (1979) 440 U.S. 268, 99 S.Ct. 1102.

Although the Statement of Decision (per Code of Civil Procedure § 634) was silent on the issue and there was nothing elsewhere in the record to indicate the trial court considered the tax consequences of its spousal award, the Court of Appeals held: "Because Karen has not shown that the court failed to consider the tax consequences of the award, we find no abuse of discretion." App. 11. That the appellate court denied equal protection under an otherwise "benign" and "neutral" law is apparent from an examination of the division of funds the court considered

in arriving at the "disposable income" for the purpose of computing spousal support (App. 10, especially fn. 7).

Appellant raised this issue again in her petition for rehearing. She pointed out that the Court of Appeals had failed to recognize that the trial court, in calculating the family's "well over $12,000" (App. 9) standard of living at the time of separation, did not take into consideration "the total paid tax liability of $103,024" for 1985, which was "paid before the monies for expenditures was made available." Appellant's Pet. For Rehearing, page 6. The husband thus received "credit" for her half of the taxes.

Petitioner firmly believes this common practice is what is causing many women to "divorce into poverty" in the opinion of many experts.

For instance (hypothetically):

At separation, couple pays 33% tax on $240,000 ($40,000 husband's tax, $40,000 wife's tax), leaving $160,000; judge divides pie in "half," leaving each $80,000 disposable income.

Second year, husband deducts wife's $80,000 support payment, pays taxes on $160,000 at 33%, leaving ± $107,000. Wife pays 33% tax on $80,000, leaving ± $53,000 net income.

Ten years after divorce, husband is ± $550,000 ahead of wife after "50-50" split simply because the law does not treat spousal support the same way it treats child support.

Thus a facially neutral law actually denies the equal protection supposedly guaranteed by community property laws to the supported spouse.

Conclusion

Appellant concluded her Petition For Rehearing by stating her belief "she has been denied Due Process of Law and Equal Protection Of The Laws under the 14th Amendment to the Constitution of the United States of America [fn. om.] and the Constitution of the State of California, Article 1, Section 7(a) [fn. om.]." Petition For Rehearing, page 10.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A WOMAN WHO REFUSES TO ABORT THE CHILD OF A RAPE IS DENIED EQUAL PROTECTION OF THE LAW WHEN THE LEGALLY MANDATED COSTS OF THAT CHILD ARE NOT CONSIDERED AS PART OF HER "NEEDS" IN ESTABLISHING SPOUSAL SUPPORT IN A COMMUNITY PROPERTY STATE.

The trial court order has the effect of discriminating against a child not by Karen's husband. If Riley had been a child from a previous marriage of Karen's, whether or not she was the custodial parent, the costs of his care and maintenance would have been included in calculating Karen's needs, since pursuant to California Civil Code §§

196 and Penal Code § 270, all children, whether born in wedlock or not, are entitled to support from their natural parents. Civil Code § 196 was amended in 1975 to delete all references to or distinctions between legitimate or illegitimate children. Further, parentage has not been established and there is no father's name on Riley's birth certificate.

There is a presumption under Civil Code § 7004 (a) that: "A man is presumed to be the natural father of a child if ... (1) He and the child's mother are or have been married to each other and the child is born during the marriage. Civil Code § 7004 (b) provides an exception to this rule if: (1) The child was conceived as a result of an act in violation of Section 261 of the Penal Code **and the father was convicted** of that violation." (Emphasis added.)

Here, there was no charge and no conviction, so absent the stipulation the child would be Michael's and Karen's, not just Karen's. Civil Code § 7002 states: "The parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents."

To deprive Riley of support violates the Equal Protection Clause of the Fourteenth Amendment. *Trimble v. Gordon* (1977) 430 US 762, 97 SCt 1459. Penalizing a wife for bearing the child of a rape by having her child rearing expenses based upon her duty to support that child excluded from the "needs" assessment mandated by Civil Code § 4801, violates equal protection of the law under both State and Federal Constitutions, under *Reed v. Reed* (1972) 404 US 71, 92 SCt 251.

The trial court erred in excluding the hardship costs of raising a Downs Syndrome child when it calculated appellant's needs as part of its spousal support order. The trial court stated Michael should not be required to pay child support for Riley. But spousal support based upon a wife's obligation mandated by law is a horse of a different duty, even if the rider is the same person.

It seems simple. If Michael's admitted affair with his secretary had resulted in a child, would the community funds of Michael's and Karen's marriage have to support that child? Under Penal Code § 270, the answer is yes. If community funds can be mandated to support the result of voluntary adultery, how more consistent with public policy of support for all children is the product of a rape, which was not a voluntarily act by Karen.

Public policy promotes stability in marriage. Under the circumstances of the instant case, the trial court's interpretation of public policy encourages a husband to immediately abandon the marriage to avoid financial responsibility for the wife's child.

Simple logic dictates that, as in this case, where the mother has a **legal obligation** to support her child (Civil Code §§ 196,; Penal Code § 270), such expenses as a **matter of law** should be included. Since Riley has Downs Syndrome, this obligation will continue for the rest of his life under Civil Code § 206. *Rebensdorf v. Rebensdorf* (1985) 169 CA3d 138, 215 CR 76.

And as *Parham v. Hughes* (1979) 441 U.S. 347, 99 S.Ct. 1742, pointed out in quoting Mr. Justice Powell in

Weber v. Aetna Casualty & Surety Co. 406 U.S. 164, 92 S.Ct. 1400, 1406-1407:

> "'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bond of marriage. But visiting the condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is **contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.**'" *Parham, supra,* 99 S.Ct. at 1746.

Karen bears no responsibility for the rape and did no wrongdoing. Making her alone bear the legal burden of Riley's existence is illogical and unjust.

II. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT THE REFUSAL TO CONSIDER DIFFERENT TAX CONSEQUENCES BETWEEN SPOUSES IN THE AWARD OF SPOUSAL SUPPORT VIOLATES EQUAL PROTECTION OF THE LAW.

Civil Code § 4801 (a) (9) mandates the trial court to take into account: "The immediate and specific tax consequences to each party."

The court did not do that.

By focusing on the "well over $12,000" alleged net monthly income, the trial court erred in not considering the $103,024 community money paid in tax liability from the gross 1985 income of $244,848.

To not credit a wife's share of the community funds paid toward the marital taxes is to unjustly enrich the husband at the wife's expense, because the initial calculation which establishes the standard of living is usually based upon after taxes available income. This is a valid approach to child support payments, because the husband pays the taxes and the child receives a tax-free sum

That is not the case, however, with spousal support, where the wife has to pay taxes on what she receives, yet that amount is a tax deduction for the husband.

As the Court pointed out in *Orr v. Orr* (1979) 440 U.S. 268, 99 S.Ct. 1102, 1113, "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."

While it is true that the California law (Civil Code § 4801) is facially neutral, the reality is that the great majority of those who are "supported" are women, and the built-in tax discrimination of the law strikes disproportionately on them.

The reality, then, is not gender-neutral and cannot withstand equal protection scrutiny.

CONCLUSION

For the reasons herein advanced, and on the authorities cited, Petitioner Karen Koelker respectfully urges that certiorari be granted and that the Court reverse the decision of the Court of Appeals and the judgment of the trial court, and order that spousal support calculations include the special needs of appellant's Downs Syndrome child, and that the tax consequences of the spousal support award be taken into consideration.

Respectfully submitted,

Karen Koelker

KAREN KOELKER, *In Pro Per*
Counsel of Record
Attorney for Petitioner

First Appellate District, Division Three, No. A057316
S035870

FILED
DEC 15 1993

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

In Re the Marriage of
KAREN AND MICHAEL KOELKER

KAREN KOELKER, Appellant

v.

MICHAEL KOELKER, Respondent

Appellant's petition for review DENIED.

LUCAS

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED
SEP 24 1993

In re the Marriage of KAREN and MICHAEL KOELKER.

- - - - - - - - - - - - - - - - - -

KAREN KOELKER,

Appellant,

v.

MICHAEL KOELKER,

Respondent.

A057316

(Super. Ct. No. 619135-5
Alameda County)

Karen Koelker appeals from a judgment awarding her $7,000 per month in spousal support. She contends that the trial court abused its discretion by awarding spousal support without considering the tax consequences of the award and the expenses of maintaining her dependent child. She also requests attorneys fees on

appeal. We find no abuse of discretion, but remand the issue of attorney fees.

FACTS

Michael and Karen Koelker were married in 1963.[1] During their 22-year marriage, they enjoyed a relatively high standard of living. At the time of their separation, Michael was employed as an advertising executive in San Francisco. Karen managed the couple's real estate investments and was involved in Berkeley politics through the Berkeley Property Owners Association.

In 1985, Karen learned she was pregnant.[2] Michael was not the father of the child. Karen testified that Eldridge Cleaver was the father and that the child was conceived by rape. Karen knew Cleaver through her dealings in Berkeley rent control politics. In March 1985, after Karen told Michael about her pregnancy, the couple began to sleep in different bedrooms. In addition, Michael contacted a real estate broker and began to look for a new residence. Michael made an offer on a Marin County home in April 1985. The offer was accepted, but Michael was unable to move into the home until October 5, 1985.

---

[1] For ease of reference, in this opinion we refer to the parties by their first names. (See *In Re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

[2] Karen testified that she learned of her pregnancy in May of 1985 and that she told Michael in late May or June. Michael testified that he learned of Karen's pregnancy in March of 1985.

The same day that Michael moved out of the couple's Berkeley residence, Karen's child, Riley R. was born. Riley was born with Down's Syndrome. Although Karen continued to associated with Cleaver and provided him with money to advance particular causes, she never sought to collect child support from him. She testified that Cleaver had no money and was therefore unable to pay child support.

On November 13, 1986, Karen filed a petition for dissolution of the marriage. The parties stipulated that Riley was not a child of the marriage, and the court awarded Karen temporary spousal support of $4,000 per month. On January 25, 1991, after a two-day trial, the court found the date of separation to be October 5, 1985.

The issue of spousal support was heard between November 5 and 7, 1991. Michael's accounting expert testified that the couple spent an average of $4,626 per month during the last two years of the marriage. Approximately $3,089 of this amount was attributable to Karen's expenses. The expert also testified that the income available to the couple averaged $12,863 per month in 1985 and $9,110 per month from 1982 to 1985. In her income and expense declaration, Karen claimed $17,330 in monthly expenses. This total included $4,217 for therapy and other treatments for Riley, $927 for health insurance for Karen and Riley, and $500 for classes Karen attended so she could learn how to care effectively for her son.

The trial court awarded Karen $7,000 per month in spousal support. The court noted that the determinative

factors in setting the amount of support were the standard of living established during the marriage and Karen's present needs. The court declined to hold Michael responsible for any expenses associated with Riley.

Karen requested a statement of decision under Code of Civil Procedure section 632.[3] The statement, which was prepared by Michael and filed on January 9, 1992, provides, in pertinent part: "In considering the factors enumerated in Civil Code section 4801, factors such as the ability of [Michael] to pay, the duration of the marriage, the age and health of the parties, and [Karen's] ability to contribute to her own support, are all resolved in favor of [Karen] and her claim for spousal support. [¶] The determinative factors are [Karen's] needs at this time and the standard of living established during the marriage. The best measure of the standard of living at the time of the marriage is the amount of money available for expenditures at the time the parties were living together. In the year 1985 the monthly average was over $12,000. The court has taken into account both the fact that the parties are no longer living as a unit and inflation. [¶] [Michael] has no obligation to support [Karen's] child by another man, and the expenses of that child are not to be considered in setting spousal support. Eliminating those expenses from [Karen's] budget and taking into account

---

[3] Code of Civil Procedure section 632 provides, in pertinent part: ". . . The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . . After a party has requested such a statement, any party may make proposals as to the content of the statement of decision. . . ." (Code Civ. Proc., § 632.)

her reasonable expenses for other items, support of $7,000 per month will meet here reasonable expenses and is consistent with the marital standard of living of the parties. . . ."

DISCUSSION

Consideration of the Tax Consequences

Karen argues that the trial court failed to consider the tax consequences of the spousal support award and that the failure to do so was an abuse of discretion. Civil Code section 4801 directs the trial court to consider 10 factors in awarding spousal support, including "[t]he immediate and specific tax consequences to each party." (Civ. Code, § 4801, subd. (a)(9).)[4] Karen did not object

---

[4] Civil Code section 4801 provides, in pertinent part: "(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable, based on the standard of living established during the marriage. In making the award, the court shall consider all of the following circumstances of the respective parties: [¶] (1) The extent to which the earning capacity of each spouse is sufficient to maintain the standard of living established during the marriage .... [¶] (2) The extent to which the supported spouse contributed to the attainment of an education, training, a career position, or a license by the other spouse. [¶] (3) The ability to pay of the supporting spouse, taking into account the supporting spouse's earning capacity, earned and unearned income, assets, and standard of living. [¶] (4) The needs of each party based on the standard of living established during the marriage. [¶] (5) The obligations and assets, including the separate property of each. [¶] (6) The duration of the marriage. [¶] (7) The ability of the supported spouse to engage in gainful employment without interfering with the

to the statement of decision and raises this issue for the first time in this appeal.

In dissolution cases, the trial court is granted broad discretion in setting the amount and duration of spousal support. (*In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 496, citing *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454.) However, this discretion is not unlimited, as "' . . . [s]pousal support orders that do not reflect a weighing of [the factors presented in Civil Code section 4801, subdivision (a)] are subject to reversal for abuse of discretion. [Citation.]'" (*In re Marriage of Smith, supra*, 225 Cal.App.3d at p. 479.)

If a statement of decision is ambiguous or fails to resolve a controverted issue, and the deficiency is raised in the trial court, we should not infer that the trial court decided the facts or the issue in favor of the prevailing party. (Code Civ. Proc., § 634.)[5] *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130 held that this rule does

---

interests of dependent children in the custody of the spouse. [¶] (8) The age and health of the parties. [¶] (9) The immediate and specific tax consequences to each party. [¶] (10) Any other factors which it deems just and equitable. . . ."

[5] Code of Civil Procedure section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 [motion for new trial] or 663 [motion to set aside and vacate judgment], it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

not apply when the appellant has failed to object to the statement in the trial court. "[I]f the statement fails to resolve a controverted issue or is ambiguous the defects must be brought to the court's attention to avoid presumptions in favor of the judgment." (*Id.*, at p. 1136.) Karen's failure to object to the statement does not waive the issue, as Michael contends, but it allows us to make "' . . . all presumptions and intendments . . . in favor of the regularity of the action of the lower court in the absence of a record to the contrary.'" (*People v. Green* (1979) 95 Cal.App.3d 991, 1001, citing *People v. Clifton* (1969) 270 Cal.App.2d 860, 862.)

In arguing that the court failed to consider the tax consequences of the award, Karen assumes that the trial court arrived at the $7,000 support figure by taking half of the $12,000 marital standard of living and adjusting it upward to account for both inflation and the fact that the parties were no longer living together as a unit, while ignoring the fact that her net income would be lower due to taxes. Karen's assumption is not warranted, as the record does not indicate that the court made or intended to make such a calculation.

While Karen bases her calculation solely on the material standard of living, this factor was one of two determinative factors the court considered in setting the spousal support award. The court also considered Karen's needs to be a determinative factor. In remarks at trial,[6]

---

[6] We note that although oral statements by the court may not be used to impeach an order or judgment, they may be valuable in illustrating the trial judge's theory. (*In re Marriage of Ditto* (1988)

the court stated, "[T]he standard of living established during the marriage and her needs at the present time are the determinative factors. And I think that . . . a good argument is made that what was available at the date of separation . . . is the best measurement of what the standard of living of the parties was, and . . . in the year '85 would have indicated a monthly average of well over $12,000. And assuming that one person doesn't live as cheaply as half of what two people live at, something in the area of 6- to $7,000 appears to be a reasonable approximation of what was happening at the date of separation. Of course, there has been some inflation since that time." The court did not end its analysis here, however, but moved on to consider a second determinative factor: "Then looking at the other factor which is her needs, it seems to me that taking the figures that [Michael's counsel] set out and increasing that somewhat in the area of maintenance of her home . . . and eliminating the expenses of [Riley R.,] . . . I'll set spousal support at $7,000 a month." Michael's counsel had argued that Karen's actual expenditures during the last two years of the marriage averaged approximately $3,089 per month.

The statement of decision also indicates that the court weighed two factors. "The determinative factors are [Karen's] meeds at this time and the standard of living established during the marriage." The court concluded that the $7,000 in monthly support "will meet her reasonable expenses and is consistent with the marital standard of living of the parties."

---

206 Cal.App.3d 643, 646, citing *Yarrow v. State of California* (1960) 53 Cal.2d 427, 438.)

The court's analysis is consistent with statutory guidelines. While the trial court is directed by Civil Code section 4801, subdivision (a), to make "specific factual findings with respect to the standard of living during the marriage"[7] (Civ. Code, § 4801, subd.(a)), this figure serves only as a reference point in setting the amount of spousal support. The marital standard of living does not provide the court with a "floor or ceiling" award. (*In re Marriage of Smith, supra*, 225 Cal.App.3d at p. 484, internal quotation marks omitted.) The court may properly set spousal support higher or lower than the marital standard of living after considering all of the factors included in Civil Code section 4801, subdivision (a), including the needs of the supported party. (Civ. Code, § 4801, subd. (a)(4); *In re Marriage of Smith, supra*, at p. 485.)

Evidence appearing in the record supports the court's decision. Michael set Karen's needs, based on her actual expenditures during the marriage, at $3,089 per month. By Karen's own calculations, the $7,000 award would yield approximately $4,389 per month after taxes. This net amount would be consistent with the figure of $3,089, increased for taxation, home repairs, inflation and the fact that the parties were no longer living together as

---

[7] We note that the marital standard of living figure in this case was actually generous, because the court based it upon income available for expenditures, while the figure is usually based on the actual expenditures during the marriage. (*In re Marriage of Smith, supra*, 225 Cal.App.3d at p. 484.) Although Civil Code section 4801 does not define "marital standard of living," it has often been described as "reasonable needs commensurate with the parties' general station in life. [Citation]." (*In re Marriage of Smith, supra*, at p. 491, emphasis added.)

a unit. Because Karen has not shown that the court failed to consider the tax consequences of the award, we find no abuse of discretion.

Expenses of Riley R.

Karen also argues that the court's failure to consider her expenses associated with maintaining her son Riley in making the spousal support award was an abuse of discretion. As stated above, the trial court is vested with broad discretion in setting spousal support awards. (*In re Marriage of Baker, supra*, 3 Cal.App.4th at p. 496, citing *In re Marriage of Morrison, supra*, 20 Cal.3d at p. 454.) "' . . . A trial court's exercise of discretion will not be disturbed on appeal unless, as a matter of law, an abuse of discretion is shown -- i.e., -- where, considering all the relevant circumstances, the court "has exceeded the bounds of reason" or it can "fairly be said" that no judge would reasonably make the same order under the same circumstances. [Citations.]' [Citations.]" (*In re Marriage of Smith, supra*, 225 Cal.App.3d at p. 480.)

In some cases, the courts have increased spousal support wards where the supported spouse has chosen to undertake expenses for which neither party is legally responsible. Karen relies primarily on two such cases. In *In re Marriage of Siegal* (1972) 26 Cal.App.3d 88, the trial court increased a spousal support award to account for the fact that wife was caring for the parties' daughter and granddaughter. The daughter had serious health problems and was unable to care for herself or her young child. In holding that the trial court did not abuse its discretion by considering this factor and increasing the award, the court

stated, "The trial court expressly noted it did not have the authority in the case at bench to require [husband] to support his daughter and granddaughter and concluded this was a circumstance it might consider in determining her need, and the amount her former husband should pay for her support." (*Id.*, at p. 93.) In *In re Marriage of Paul* (1985) 173 Cal.Ap.3d 913, the court applied the rationale set out in *Siegel* and held that the trial court abused its discretion to award in an award modification proceeding by failing to consider wife's expenditures toward the college education of the parties' adult child. The court noted that if husband had undertaken the expenses, that factor would be considered when determining his ability to pay spousal support. The court then concluded that it was inconsistent to "ignore [these] factors when it is the supported spouse who is expending monies on education of an adult child." (*In re Marriage of Paul, supra*, at p. 920.) The court also stated, "wife's choosing to spend money to educate her adult children, even though not legally obligated to do so, is not only justified but is also morally commendable." (*Ibid.*)

Both *Siegel* and *Paul* may be significantly distinguished from the case at bench. In each case, neither party nor any third party could be held legally responsible for the expenses at issue. In this case, the situation is quite different. The father of the child, Cleaver, has a legal responsibility to provide for the care of his son. Karen has taken no steps to secure such support. The trial court expressly refused to extend the reasoning behind *Siegel* and *Paul* to this specific situation. Before setting the support award, the court commented, "I don't see how [the expenses of the child] can be included as a charge against

[Michael]. Spousal support has frequently been increased where a wife has undertaken the college expenses of a child who's no longer entitled to child support. but I can't really see expanding that into this situation." The court's ruling that Michael should not be responsible for the expenses of Riley was not an abuse of discretion.

Attorneys Fees

Finally, pursuant to Civil Code section 4370, Karen asks the court to award her attorneys fees on appeal. Four conditions must be met to warrant such an award. "(1) the requesting spouse must show a need for the award; (2) the paying spouse must have the ability to pay the fees; (3) the appeal must be taken in good faith; and (4) there must be reasonable grounds for the appeal in the sense that reasonable persons should believe that the contentions merit the appellate court's attention and resolution. [Cit.]" (*In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 258.) We find that Karen acted in good faith and that she had reasonable ground for the appeal. However, the trial court can better determine Karen's needs for an award of attorneys fees and Michael's ability to pay such an award. (*Ibid.*) Therefore, we remand to the superior court to determine if Karen is entitled to an award of attorneys fees and the amount of any award.

DISPOSITION

The order is affirmed. We remand to superior court to determine what award, if any, appellant shall receive for attorneys fees on appeal. Appellant shall pay respondent's costs on appeal.

COURT OF APPEALS
OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 3

FILED
OCT 21 1993

KOELKER, KAREN
vs.
KOELKER, MICHAEL
IN RE MARRIAGE OF KOELKER
A057316 Old No. A030366
Alameda County No. 6191355

BY THE COURT:

The petition for rehearing is denied.

Dated: OCT 21 1993

WHITE, P.J.

_____, P.J.

STATUTES INVOLVED IN THE CASE

A. California Civil Code

1. Section 196 provides:

> The father and mother of a child have an equal responsibility to support and educate their child in the manner suitable to the child's circumstances, taking into consideration the respective earnings or earning capacities of the parents.

2. Section 206 provides:

> It is the duty of the father, the mother, and the children of any person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay the necessaries previously furnished to such parent is binding. A person who is receiving aid to the aged shall be deemed to be a person in need who is unable to maintain himself by work.

3. Section 4801 provides, in pertinent part:

> (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period

of time, as the court may deem just and reasonable, based on the standard of living established during the marriage. In making the award, the court shall consider all of the following circumstances of the respective parties: [¶] (1) The extent to which the earning capacity of each spouse is sufficient to maintain the standard of living established during the marriage . . . . [¶] (2) The extent to which the supported spouse contributed to the attainment of an education, training, a career position, or a license by the other spouse. [¶] (3) The ability to pay of the supporting spouse, taking into account the supporting spouse's earning capacity, earned and unearned income, assets, and standard of living. [¶] (4) The needs of each party based on the standard of living established during the marriage. [¶] (5) The obligations and assets, including the separate property of each. [¶] (6) The duration of the marriage. [¶] (7) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse. [¶] (8) The age and health of the parties. [¶] (9) The immediate and specific tax consequences to each party. [¶] (10) Any other factors which it deems just and equitable. . . .

4. Section 7001 provides:

> As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

5. Section 7002 provides:

> The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

6. Section 7004 (a) provides, in pertinent part:

> (a) A man is presumed to be the natural father of a child if he meets the conditions set forth in Section 621 of the Evidence Code or in any of the following subdivisions:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. . . .

7. Section 7004 (b) provides:

> (b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

B. California Code of Civil Procedure

1. Section 634 provides, in pertinent part:

> When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue.

C. California Penal Code

1. Section 270 provides, in pertinent part:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. . . .